Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

THE SUPREME COURT
OF THE UNITED STATES

NO. 77-321

Upper West Fork River Watershed Association, by Kenneth Parker, President, Lewis County, West Virginia,

Petitioner,

versus,

Corps of Engineers, United States Army, Department of Defense, United States Army, James R. Schlesinger, as Secretary of Defense, W. G. Delbridge, as District Engineer, Howard H. Callaway, as Secretary of the United States Army,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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THE SUPREME COURT
OF THE UNITED STATES

NO. _____

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## REPORTS OF OPINIONS BELOW

Upper West Fork River Watershed Assoc., By Kenneth Parker, President, Lewis County, West Virginia, Plaintiff, v. Corps of Engineers, United States Army et al., Defendants, 414 F. Supp. 908 (1976).

## JURISDICTION

The jurisdiction of this Court is invoked as a result of the United States Court of Appeals for the Fourth Circuit on the 9th day of May, 1977, affirming a summary judgment passed on the 3rd day of May, 1976 by the United States District Court for the Northern District of West Virginia. A petition for rehearing was denied by the United States Court of Appeals for the Fourth Circuit on the 1st day of June, 1977. The statutory provision

which is believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 USC 2101 (c).

QUESTIONS FOR REVIEW

A. Was prejudicial error committed when statements in the affidavits in support of summary judgment and statements in the depositions were weighed, as well as when other material was weighed, in considering the respondents' motion for summary judgment?

B. Was a challenge to the respondents' motion for summary judgment waived?

C. Was prejudicial error committed in considering for summary judg-



ment material brought forward by the district court, which was not permitted to be challenged by the parties to this action?

D. Was prejudicial error committed in considering for summary judgment an uncirculated supplemental environmental impact statement?

E. Was prejudicial error committed in not striking from the record an uncirculated supplemental environmental impact statement?

F. Was a summary judgment correctly granted?

G. Was the respondents' environmental impact statement adequate?

CONSTITUTIONAL, STATUTORY,

and REGULATORY PROVISIONS INVOLVED

1. CONSTITUTION OF THE UNITED STATES AMENDMENT V:

No person shall be ... deprived of life, liberty or property, without due process of law ....

2. CONSTITUTION OF THE UNITED STATES AMENDMENT IX:

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

3. 42 UNITED STATES CODE 4232

The Congress authorizes and directs that, that to the fullest extent possible ... all agencies of the Federal Government shall ---



...

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and techinical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided whould the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable committements of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement the responsible Federal official shall consult with and obtain the comments of any federal agency which has jurisdiction by law or special expertise with respect to any environmental im-



pact involved. Copies of such statement and the comments and views of the appropriate Federal, State and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by Section 552 of Title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresloved conflicts concerning alternative uses of available resources.

...

4. 36 Federal Register, &7725

6. Content of environmental statement. (a) The following points are to be covered:

(i) A description of the proposed action including information and technical data adequate to permit a careful assessment of environmental impact by commenting agencies. Where relevant, maps should be provided.

(ii) The probable impact of the proposed action on the evironment, including impact on ecological systems such as wildlife, fish, and marine life. Both primary and secondary significant consequences for the environment should be included in the analysis. For example, the implications, if any, of the action for population distribution or concentration should be estimated and an assessment made of the effect of any possible change in population patterns upon the resource base, including land use, water, and public services, of the area in question.



(iii) Any probable adverse environmental effects which cannot be avoided (such as water or air pollution, undesirable land use patterns, damage to life systems, urban congestion, threats to health or other consequences adverse to the environmental goals set out in section 101(b) or the Act).

(iv) Alternatives to the proposed action (section 102(2)(D) of the Act requires the responsible agency to "study, develop, and describe appropriate alternatives to recommended

courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources"). A rigorous exploration and objective evaluation of alternative actions that might avoid some or all of the adverse environmental effects is essential. Sufficient analysis of such alternatives and their costs and impact on the environment should accompany the proposed action through the agency review process in order not to foreclose prematurely options which might have less detrimental effects.

(v) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity. This in



essence requires the agency to assess the action for cumulative and long-term effects from the perspective that each generation is trustee of the environment for succeeding generations.

(vi) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. This requires the agency to identify the extent to which the action curtails the range of beneficial uses of the environment.

(vii) Where appropriate, a discussion of problems and objections raised by other Federal, State, and local agencies and by private organizations and individuals in the review

process and the disposition of the issues involved. (This section may be added at the end of the review process in the final text of the environmental statement.)

(b) With respect to water quality aspects of the proposed action which have been previously certified by the appropriate State or interstate organization as being in substantial compliance with applicable water quality standards, the comment of the Environmental Protection Agency should also be requested.

(c) Each environmental statement should be prepared in accordance with the precept in section 102(2)(A) of the Act that all agencies of the Federal Government "utilize a systematic, interdisiciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decisionmaking which may have an impact on man's environment."



(d) Where an agency follows a practice of declining to favor an alternative until public hearings have been held on a proposed action, a draft environmental statement may be prepared and circulated indicating that two or more alternatives are under consideration.

(e) Appendix 1 prescribes the form of the summary sheet which should accompany each draft and final environ-

mental statement.

....

STATEMENT OF CASE
AND BASIS FOR FEDERAL
JURISDICTION

The respondents propose to build the Stonewall Jackson Lake Project at Brownsville in Lewis County, West Virginia, which will tenatively involve the construction of a high rise dam that would inundate 3,500 acres of land at full pool and that would involve the federal government taking 21,000 acres of land, which is inhabitated by approximately two thousand people. The petitioner is a West Virginia corporation composed of members living inside and outside the 21,000 acres, which is proposed to be



taken. The petitioner filed a suit in the United States District Court for the Northern District of West Virginia alleging the environmental impact statement, which was prepared by respondents pursuant to 42 U.S.C. § 4321 et seq. and the Council on Environmental Quality Guidelines, was deficient and the petitioner's Fifth and Ninth Amendment rights under the United States Constitution were violated.

At the heart of petitioner's case is its belief that the respondents failed to explore the construction of a watershed in conformity with 16 U.S.C. § 1001 et seq. as an alternative to the construction of a high rise dam, in order that the approxi-

mate 2,000 inhabitants of the 21,000 acre "take area" would not be forced to leave and in order that so much agricultural and forest land would not have to be inundated.

The District Court weighed the evidence presented on the watershed alternative. This weighing of the petitioner's evidence was apparent in the District Court's discussion with its reference to "scant items" on the watershed issue, including the "unsupported statement that 'watershed projects [are] a good way to provide flood protection' (Holt Aff't)" and the "speculative and conclusionary" report of the Department of Natural Resources. The District Court weighed other material, including a "1966 Report", which



is contended to have been properly before the District Court, against the previously mentioned affidavit and exhibit.

The District Court's classification of Holt's affidavit as an "unsupported statement," apparently ignored his occupation as a civil engineer. It also ignored specific facts and opinions based on these facts which were within the affidavit. Holt's affidavit showed the watershed is superior to the high rise dam, increasing safety, eliminating loss of farmland, not requireing relocation, etc. Holt's affidavit that "watershed projects [are] a good way to provide flood protection" was supported by his

training and study, and by his experience with the Polk Creek Project, which was completed in 1968.

The District Court's classification of the Department of Natural Resources (hereinafter referred to as D. N. R.) survey as "speculative and conclusionary" is a strange weighing of this evidence. The D. N. R. apparently did not have a specific proposal before it, as it would have had, if the E.I.S. had included a watershed project, and, further, the lack of clarity in the report could have been corrected at a trial which could allow in-depth inquiry into the feasibility which the D. N. R. found.

The District Court also weighed



the evidence on flood danger, dismissing the evidence favoring the Watershed Association, as found in Holt's affidavit (" ... since the Polk Creek Project was completed the stream has not been outside of its banks."), while giving considerable weight to the respondents' speculation about flood danger.

The petitioner in agreeing to and signing the Order of the District Court entered November 21, 1975, as set forth in the footnotes to the District Court's memorandum order (which is appended herein), intended that the submission of the case on cross-motions for summary judgment would be in lieu of the hearing set for November 21,

1975, and not in lieu of a trial on the genuine issues of material fact, if any, remaining after proper consideration by the court of the cross-motions. By submitting the case on cross-motions, the petitioner did not intend to suggest that the Court should be allowed to resolve any genuine issue as to any material fact through the summary judgment procedure.

The District Court prejudicially erred by considering and by relying in its memorandum opinion upon evidence, a document, which was not properly before the Court on the cross-motions for summary judgment. The document, is a public congressional document entitled West Fork River and Tributaries, West



Virginia, S. Doc. No. 109, 89th Cong., 2d Sess. (1966) (hereinafter referred to as the "1966 Report"). The District Court Judge characterized this 1966 Report, as an "important document" and as "supporting material" to "provide the more inquisitive or sophisticated reader with a detailed technical basis for the conclusions in the E.I.S." The Court relied on information found in the "1966 Report" in several places in the memorandum order.

The District Court, in its discussion of alternatives to the Stonewall Jackson dam, quotes extensively from the "1966 Report's" discussion of alternatives. This discussion is used by the District Court as it determines

why a "watershed program" was not listed as an alternative in the E.I.S.

The Court cites the "1966 Report", which "considered and rejected" some type of a watershed project, in making its determination that omission of the watershed project alternative in the E.I.S. did not violate the applicable standards for agency action.

The District Court also relied upon the "1966 Report" as the source of census data and population projections, as the source of cost projections for West Virginia's share of operations, as the source of its information about public hearings, and as the source of exitmates of potential flood damage, even though a watershed pro-



ject on one of the two streams flowing into Weston was completed in 1968, two years after the "1966 Report" was published.

The District ordered the Clerk of the Court to file the document with the records. This "1966 Report", on which the District Court so heavily relied, was not properly before the Court on the cross-motions for summary judgment. The document was not submitted by the parties, but was brought to the Court's attention by reference in a footnote in the General Design Memorandum, which was attached to the only deposition the petitioner took of the respondents, and was subsequently obtained by the District Court for its

consideration, without the knowledge of your petitioner.

Attached to the respondents' motion for summary judgment at the district court, was the "West Fork River - West Virginia Review of Environmental Features Relating to the Stonewall Jackson Lake Project" (hereinafter referred to as the "Review). The "Review" is a supplemental environmental impact statement in that it was a mutliple page expansion of the original environmental impact statement filed with regard to the proposed Stonewall Jackson Lake Project, that was published shortly prior to the originally scheduled November, 1975, hearing and the "Review" was never cir-



culated to any reviewing agencies, the petitioner objected to the District Court considering the "Review", but such objection was overruled by the District Court.

The environmental impact statement which was prepared by the respondents was deficient in:

1. not considering a watershed within the meaning of 16 U.S.C. §1001 et. seq. as an alternative;

2. using an interest rate of 3 1/4% to compute a benefit cost ratio;

3. misleading the decision-makers, with regard to flood damage in the area, since

the 1950 flood ( a century flood) was used as the example to indicate annual damage;

4. failing to cite scientific literature for the conclusions contained in the environmental impact statement;

5. in failing to discuss certain adverse effects of the proposed high rise dam; and

6. that the public was not involved in the preparation of the environmental impact statement.

It is apparent that the watershed is potentially feasible according to the West Virginia Department of Natural Resources. It is also apparent that the Governor of West Virginia was interested in a feasibility study.



## REASONS RELIED ON FOR GRANTING PETITION FOR WRIT OF CERTIORARI

There is no question that the respondents' environmental impact statement failed to consider a watershed project within 16 U.S.C. §1001 et. seq. as an alternative to the high rise dam. There is no question that the West Virginia Department of Natural Resources considers such feasible in light of the document filed at the time of submission of the case on briefs to the district court and in light of the exhibit

attached to petitioners petition for a rehearing which was filed at the United States Court of Appeals for the Fourth Circuit. What is in question is whether the manner in which the significance of omitting a watershed alternative was improperly handled by the district as "(s)ummary judgment is not to be turned into a trial by affidavit." Redman v. Warrener, 516 F.2d 766, 768 (1st Cir. 1975).

The district court took the position that by agreeing to submit the case on cross-motions for summary judgment that petitioner was precluded from opposing the granting of a motion for summary judgment in favor of the respondents. Indeed, even if the parties had wished the Court to decide the



entire case via the summary judgment proceedings, such a waiver of genuine issues would not have been permissible. The Court, not the parties, must determine whether there is a genuine issue of material fact; a determination by the parties that there is no such issue is not controlling. If there is a genuine issue as to a material fact, summary judgment is not available. Cram v. Sun Ins. Office, 375 F.2d 670, 673 (4th Cir. 1967).

Federal Rule of Civil Procedure Rule 56(c) clearly defines and limits the evidence which is appropriate in consideration of a motion for summary judgment by stating that "The judgment sought shall be rendered forthwith if

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Emphasis added.) The rule does not provide for utilization of additional information secured by the court sua sponte, and courts have consistently discouraged the use of additional evidence. Additional information gathered by the court "must not ordinarily be received in camera, without disclosure to the parties prior to decision, and without affording an opportunity to make appropriate response by answering affidavit or



otherwise. The matters to be considered by the district court in a summary judgment proceeding are limited to those authorized by Federal Civil Procedure Rule 56." United States ex. rel Barber v. Commonwealth of Pa., 429 F.2d 518, 520 (3rd Cir. 1970). No case sancitioning use of evidence beyond the scope of Federal Rule of Civil Procedure 56(c), such as the "1966 Report", has been found in any district or circuit court. Further, the Court's use of the "1966 Report" brings to the case the very problems set forth by the Court in Barber, supra. The report was received by the Court without disclosure to the petitioner, and without affording the petitioner an opportunity to

respond to the opinions and information set out in the report. This lack of opportunity to respond is especially critical and prejudicial since the report is now ten years old, and the petitioner, if given an opportunity to do so, could have supplemented and contradicted information contained therein, such as challenging whether the watershed project in the "1966 Report" was within the parameters of 16 U.S.C. §1001 et. seq. or challenging the conclusion since completion of subsequent projects on other streams in the area to be served by the proposed project.

The "Review" (uncirculated supplemental environmental impact



statement) was improperly before the district Court as petitioner's motion to strike the "Review" from the record was well founded.

In Natural Resources Defense Council, Inc. v. Callaway, 524 F.2d 79 (2d Cir. 1975), the circuit court agreed with the district court's finding that supplemental data and statements may be used to bolster an otherwise deficient E.I.S. ". . . . when the supplemental adequately remedies the deficiency or analyzes the impact of the proposed charge and is properly circulated among the appropriate agencies before a final decision has been reached." (Emphasis added) Callaway, supra, at 92. The requirement that

the supplemental statement be circulated for comment by the various agencies is a recurrent one. The district court in Callaway so held at 389 F. Supp. 1263, 1277 (D. Conn. 1974). Also, in I-291 Why? Assoc. v. Buns, 517 F. 2d 1077, 1081 (2d Cir. 1975), the E.I.S. was criticized as being too conclusory in its treatment of air and noise quality aspects. Subsequent air and noise studies were held to not cure the inadequacies because the studies were not circulated for review and comment. The second circuit held the E.I.S. inadequate and affirmed the granting of a motion for a prelininary injunction. The district court opinion in Buns relies upon Natural Resources



Defense Council, Inc. v. Morton, 337 F. Supp. 170 (D. D.C. 1972), as the basis for its holding on the need for circulation of the supplement. There the court held that by neither an addendum for comment and review by any other federal agencies, nor soliciting the views of federal, state, and local agencies on the addendum that §4332(2)(c) of NEPA was not complied with. Morton, supra, at 172. City of Romulus v. County of Wayne, 392 F. Supp. 573, 597 (E.D. Mich. 1975), also relied upon the language in Morton to the same result.

One case which appears to deviate from the above line is Sierra Club v. Morton, 510 F.2d 813 (5th Cir. 1975)

in which the court did not require that the probability analysis supplement which was referred to in the E. I. S. and stated in the E.I.S. to be available on request need not be "... subjected to the necessary comment and review procedures otulined by Section 102(2)(c) of NEPA." The Court reasoned that the decision maker would have the information before acting and the procedure had also alerted other interested parties to the existence of the hazard. The court concluded that due to the specialized nature of the information, the unique expertise of the agency involved, and the immediate need for the project to proceed, that the procedure used was not unacceptable.



The hazard was of a military nature and the agency was the Secretary of Defense. The need was for oil and gas drilling. Sierra Club would be easily distinguished from the case at bar as involving non specialized information, no unique expertise and a situation in which the uncirculated material was referred to by reference and stated to be available (as it is undisputed that the environmental impact statement before this Court makes no reference to the watershed alternative). Both Callaway opinions - 524 F.2d at 92 and 389 F.Supp at 1277 - contain language that the critical agency decision must be made after the supplement has been circulated, considered and

discussed in the light of the alternatives, not before. "Otherwise, the process becomes a useless ritual, defeating the purpose of NEPA, and rather making a mockery of it." Callaway, supra, at 92. Thus, even in the extreme case such as Sierra Club, the decision on the agency action must be made after consideration of the supplement. "An E.I.S. should not be simply a post hoc justification for a decision already made." Callaway, supra, at 1277. The district court went on to note that supplemental statements could be used after a preliminary decision is made, but the supplementals must be prepound and in good faith.



The District Court seemed to justify the use of such material by Afton Alps Inc. v. United States, 392 F. Supp. 543 (D. Minn. 1974). The Afton Court was reviewing an " ... informal decision-making ...." (Afton at p. 551) and "... the input into the decision-making process ...." (Afton, supra,). In such informal decision making "... the agency is not required to make specific findings to support its decision." (Afton, id). The matter in the case at bar differs substantially from Afton Alps, Inc. v. United States, in that it concerns the Court's review of a formal statement (the E.I.S.), which contained specific findings, which was sent to some govern-

mental agencies, which was commented on by governmental agencies, which was rewritten following comments made by governmental agencies and which was to be reviewed by the Court to determine its adequacy. The Review was not sent to any reviewing agencies, but was submitted directly to the Court.

The Petitioner filed a fimely objection to the "Review", which was overruled with the District Court stating the "Review" was of no consequence in its decision. Petitioner believes that in light of the previous paragraphs that the District Court erred and such error was prejudicial to their case because by considering such material the "due process"



clause of the Fifth Amendment to the United States Constitution was violated, just as it was when the District Court did not give petitioner a chance to respond to the "1966 Report".

The District Court should have granted a summary judgment, but it should have been for the petitioner, rather than the respondents. The impact statement must be a detailed statement according to 42 U.S.C. § 4332(C) 9i.e. "... marked by abundant detail or thoroughness in treating small items or parts.", Environmental Defense Fund v. Corps of Engineers, 331 F. Supp. 925 [D. C.C. 1971] [granting preliminary injunction], 348 F. Supp. 916, 932 [N.D. Miss. 1972]).

There appears to be two views as to what alternatives need be considered by the Courts. In Environmental Defense Fund v. Corps, 325 F. Supp. 744, 759 (E.D. Ark. 1971), (granting injunction) it was stated:

> Where experts, or concerned public or private organizations, or even ordinary lay citizens, bring to the attention of the responsible agency environmental impacts which they contend will result from the proposed agency action, then the §102 statement should set forth these contentions and opinions, even if the responsible agency finds no merit in them whatsoever. Of course, the §102 statement can and should also contain the opinion of the responsible agency with respect to all such viewpoints. The record should be complete. Then, if the decision makers choose to ignore such factors, they will be doing so with their



eyes wide open.

In Committee for Nuclear Responsibility v. Seaborg, id. at 787 (D.C. Cir. 1971). The other rule was stated as follows:

> When, as here, the issue of the procedure relates to the sufficiency of the presentation in the statement, the Court is not to rule on the relative merits of competing scientific opinion. Its function is only to assure that the statement sets forth the opposing scientific views and does not take the arbitrary and impermissable approach of completely omitting from the statement, and hence from the focus that the statement was intended to provide for the deciding officials, any reference whatever to the existence of responsible scientific opinions concerning possible adverse environmental effects....
>
> Only responsible opposing views need be included

> and hence there is room for discretion on the part of the officials preparing the statement; but there is no room for an assumption that is conclusive (original italicized instead of underlined).

In the case at bar the E.I.S. is deficient under both views. Under what petitioner considers the better rule as was set forth in the Arkansas decision, the E.I.S., before this Court is not a complete record as a result of the respondents' statement at the taking of their deposition that watersheds are not within the definition of flood plain management and therefore were not even considered as an alternative. The watershed is a commonly used approach to provide flood protection and recreational benefits with one being comple-



ted in 1968 on Polk Creek,(which is one of the three streams flowing into the city and that is within approximately ten miles from the 21,000 acres the respondents contemplate condemning). The E.I.S. is deficient under the District of Columbia decision as the watershed alternative is arbitrarily, impermissibly, and completely omitted from the E.I.S. before this Court, although it is a responsible opposing view. In the Arkansas case the Court noted at page 748 that

> (5) the statements do not adequately explore the "alternatives to the proposed action."
> ....
> (10) Neither the statements themselves, nor the evidence introduced indicates that the defendants (have complied with 42 U.S.C. 4332 [D]).

In Volume I of Comprehensive Survey of the Monongahela River which was prepared by the West Virginia Department of Natural Resources in 1973 and filed with the District Court it is noted at pages 384-385 that there were thirteen watershed and flood prevention projects in 1971 (i.e. the year the final draft was made) under various stages of construction and completion in the Monongahela River Basin (which Basin includes the Upper West Fork River). It is stated at page 285 that eight additional watershed projects were found to be potentially feasible, including the Upper West Fork River.

Petitioner believes a watershed project offers an alternate "optimum"



solution, and yet it is not even discussed.

> If there exists any alternative, which would satisfy all of the competing interests---that is, an alternative in which all of our citizens would "have their cake and eat it too"---this should be made explicit in any "detailed statement" required by NEPA.

Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 749, 762 (E. D. Ark. 1970-71). The case at bar presents an alternative where the people can "have their cake and eat it too", as the people would not be displaced, the land, timber, cemeteries, schools, churches, coal, etc. would not be condemned or inundated, if a watershed project were utilized. The fail-

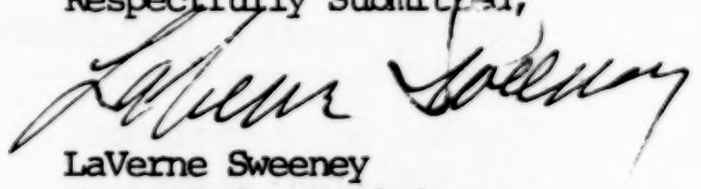
ure to include the watershed project as an alternative is in direct violation of NEPA's requirement to "(s)tudy, develop, and describe appropirate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources". 42 U.S.C. §4332 (D). The Seventh Circuit in Swain v. Brinegar, 517 F. 2d 766 (7th Cir. 1975) found the E.I.S.

> ...must realistically consider all reasonable available alternatives to the proposed project.... Analysis of these alternatives must be "detailed" and must reflect meaningful eveluation not only of purely local considerations, but of any significant national or world wife implications as well.



With this major failure to include a 16 U.S.C. §1001 et. seq. watershed, the respondents' environmental impact statement was inadequate and the district court and appellate court incorrectly ruled and this Court should grant petitioner's petition in order that the matter might be correctly resolved.

Respectfully Submitted,



LaVerne Sweeney
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above entitled cause by enclosing the same in an envelope addressed to each such attorney and Solicitor General of the United States at his or her respective address as disclosed by the pleadings and Supreme Court Rules of record herein, with postage fully paid, and by depositing said envelope in a United States Post Office depository in Grafton, West Virginia, on the 29th day of August, 1977.

LaVerne Sweeney

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Supreme Court, U. S.
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# APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEAL

FOR THE FOURTH CIRCUIT

No. 76-1710

Entered June 1, 1977

Upon consideration of the appellant's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Bryan, for a panel consisting of Judge Bryan, Judge Russell, and Judge Widener.

For the Court,

/s/ William K. Slate, II

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 76-1710

Entered May 9, 1977

PER CURIAM:

Upper West Fork River Watershed Association, a West Virginia corporation formed to encourage and promote a watershed project on the River's tributaries, sought unsuccessfully to enjoin construction of the Stonewall Jackson Lake Project near Brownsville, West Virginia and it now appeals.

The suit was premised on three grounds: (1) inadequacy of the Environmental Impact Statement (EIS) filed by the Corps of Engineers pursuant to the National Environmental Policy Act,



42 USC 4231 et seq. (NEPA); (2) non-compliance of the project with goals of NEPA; and (3) violation by the undertaking of appelant's rights under the Fifth and Ninth Amendments. Names as defendants were the United States Army, the Army Corps of Engineers, the Department of Defense, the then Secretaries of Defense and of Army, and the Corps' District Engineer for the Pittsburgh District.

The District Court, by agreement deciding on cross-motions for summary judgment, declared the EIS adequate under NEPA standards and plaintiff's second and third grounds meritless. Summary judgment was passed for the defendants on May 3, 1976. The Asso-

ciation appeals. We affirm for reasons stated in the Memorandum Order of the District Judge. Upper West Fork River v. Corps of Engineers, Civil Action No. 74-140-E (NDWVa. May 3, 1976).

Affirmed.



IN THE UNITED STATED DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA

CIVIL ACTION NO. 74-140-E

MEMORANDUM ORDER

Plaintiff, the Upper West Fork River Watershed Assoc., essentially seeks to enjoin further work on the Stonewall Jackson Lake Project in Lewis County, West Virginia, until alleged deficiencies in the environmental impact statement (the "EIS") relating to the project are cured.[1] The lake project, to be completed by the U. S. Army Corps of Engineers, will require approximately 21,000 acres of privately owned land in the West Fork River basin. The project is for flood control and other purposes;

its dam will create a lake of 3,470 acres when at full pool.

Plaintiff is a West Virginia corporation with 597 members, 75 per cent of whom own real estate in the project area. Plaintiff's express purpose is to "encourage and promote" a watershed project on the tributaries of the West Fork River and thus avoid losing the lands of its members through eminent domain proceedings to the Stonewall Jackson Lake Project. (Plf.'s Interrog. Ans. 2 and 4; Compl., par. 2.)

Names as defendants are the U. S. Army Corps of Engineers (the "Corps"), the United States Army itself, the United States Department of Defense,



and three individuals who occupied official positions when the compliant was filed: James R. Schlesinger, then Secretary of Defense; W. G. Delbridge, then the Corps' District Engineer for the Pittsburgh District, and Howard H. Callaway, then Secretary of the Army.

## Development of the Litigation; the Record

Plaintiff, in its complaint filed July 11, 1974, alleges jurisdiction under 5 U.S.C. §701 et seq. (review of agency action), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201 (declaratory judgment), 42 U.S.C. § 4321 et seq. (National Environmental Policy Act, "NEPA"), and the Fifth and Ninth Amendments to the United

States Constitution.

In the first cause of action, Plaintiff attacks the adequacy of the EIS filed by the Corps concerning the project. Plaintiff alleges that the EIS is "vague; incomplete; misleading; erroneous" and "conclusionary." Plaintiff further claims that the EIS is "non-reviewable ... in its present form" and does not comply with either the requirements of 42 U.S.C. § 4321 et seq. or the guidelines of the Council on Environmental Quality (the "CEQ"). (The final EIS, which the Corps filed with the CEQ on October 6, 1971, is attached to the complaint as an exhibit.)

In its second cause of action,



plaintiff asserts that the "decision of the defendants to undertake the said project is not insubstantial compliance with the goals Congress declared in 42 U.S.C. 4321 et seq."

Finally, in the third cause of action, Plaintiff claims that pursuit of the project, especially in light of the present EIS, violates Plaintiff's Fifth and Ninth Amendment rights.

Plaintiff seeks (1) a temporary injunction to prevent further action on the lake project; (2) an order directing the Defendants to prepare a new EIS which will cure the alleged deficiencies in the present statement; and (3) a determination whether

Defendants are violating Plaintiff's rights under the Fifth and Ninth Amendments and under 42 U.S.C. § 4321 et seq.

The Defendants answered on September 16, 1974, denying the charging allegations of the complaint. On November 15, 1974, the Defendants directed extensive interrogatories to Plaintiff, which were answered on December 27, 1974. The Plaintiff filed supplemental answers to four interrogatories on December 22, 1975.

On December 12, 1974, Plaintiff's counsel deposed George Cingle, Jr., Chief of the Planning Branch of the Corps' Engineering Division in Pittsburgh. At the request of



Plaintiff's counsel, the Corps' January 1971 General Design Memorandum, which is essentially the project plan, was attached to the transcript of the Cingle deposition. The deposition and attachments were filed and are part of the record.

A hearing on Plaintiff's motion for a preliminary injunction was set for November 21, 1975. Prior to the hearing date, the parties "agreed that in lieu of the hearing ... the issues raised in this litigation can be submitted to the Court for decision by way of cross-motions for summary judgment." The agreement of the parties is relected in the Court's November 21, 1975, order.[2] Pursuant

to the order, the Defendants filed their motion for summary judgment on December 15, 1975. With the motion, the Defendants, under the affidavit of Colonel Max R. Janairo, Jr., the Corps' District Engineer (Pittsburgh District), filed a document dated November 1975 and entitled "Review of Environmental Features Relating to the Stonewall Jackson Lake Project" (hereinafter the "1975 Review"). (Map folios attached to the 1975 Review were also filed.) The Plaintiff filed its cross-motion for summary judgment on January 5, 1976.

With the motion, Plaintiff filed the affidavits of (1) its president, Kenny Parker, (2) M. S. Holt, Jr., one



of Plaintiff's members who is a civil engineer, (3) Clara Mae Spray, another of Plaintiff's members, and (4) Dr. S. Thomas Bond, an inorganic chemist. (Maps concerning coal reserves accompany the Bond affidavit.) Plaintiff also filed several documents: a map folio styled Development of Water Resources in Appalacia (Exhibit A); a Comptroller General's report: Improvements Needed in Making Benefit-Cost Analyses for Federal Water Resources Projects (1974)(Exhibit 2); and a book entitled Comprehensive Survey of the Monongahela River (1973), prepared by the West Virginia Department of Natural Resources (Exhibit 3).

Both sides submitted briefs in support of their motions for summary judgment and, in addition, the Court has had the benefit of a brief submitted by several organizations who appear amici curiae, namely, the Clarksburg Chamber of Commerce, the Association for Industrial Development of Harrison County, the Lewis County Chamber of Commerce and the Buckhannon Chamber of Commerce.[3]

In this action Plaintiff focuses its attack on the EIS filed by the Corps. As is detailed more fully, infra, the Court's review must focus upon the EIS itself and the Information which the Corps compiled and utilized. This includes all studies



and reports which affect the content of the EIS. See Afton Alps, Inc. v. United States, 392 F. Supp. 543, 550-51 (D. Minn. 1974). One important document, a 1966 Corps report on the West Fork River and its tributaries, was not submitted to the Court by the parties, although it was brought by reference to the Court's attention. The report, a public Congressional document, is entitled West Fork River and Tributaries, West Virginia, S. Doc. No. 109, 89th Cong., 2d Sess. (1966). This report (hereinafter the "1966 Report") is identified in the General Design Memorandum (page 7) as "the project document" and "the basis for the West Fork River Basin ...

legislative action." Because of the importance of this public document, the Court has obtained a copy, and the Clerk will be directed to file the same as part of the record.

A final observation concerning the record is needed. The Plaintiff has moved to strike from the record the Corps' 1975 Review which Defendants submitted with their summary judgment motion under the affidavit of Colonel Janairo, the Corps' District Engineer. Plaintiff objects to the 1975 Review claiming that it is an improper attempt to supplement the EIS with uncirculated material.[4] In their reply brief, Defendants readily concede that the 1975 Review is not a



supplement to the EIS. Instead, the 1975 Review is simply offered to support conclusions in the EIS. Under such circumstances, it seems proper, since documents identified by affidavit may be submitted to support a motion for summary judgment, that the 1975 Review remain in the record unstricken. Pollack v. City of Newark, N. J., 147 F. Supp. 35, 39 (D.N.J. 1956), aff'd, 248 F. 2d 543 (3rd Cir. 1957), cert. denied, 355 U.S. 964 (1958), reh. denied, 362 U. S. 907 (1960); 10 Wright & Miller, Federal Practice and Procedure; Civil § 2722. Of course, Plaintiff was free to respond to the Janairo affidavit and the 1975 Review as pro-

vided by Rule 56(e), F. R. Civ. P. However, the Court notes that the 1975 Review is basically cumulative and is unessential to the Court's decision in this case.

The Propriety of Summary Judgment

As noted, this case is before the Court on cross-motions for summary judgment. The parties, including the Plaintiff, expressly indicated that they did not desire an evidentiary hearing and agreed that the entire case should be submitted for decision on cross-motions for summary judgment. (See footnote 2, supra.) In its motion, Plaintiff asserts that there is "no genuine issue as to any material fact." However, in its



brief, Plaintiff may imply a somewhat different position. Plaintiff may be urging in its brief that it can be awarded summary judgment but that summary judgment for the Defendants would be improper because material factual issues stand in the way. There is no proffer by Plaintiff, however, of such material factual issues, nor are there inferences from which such could arise.

In the absence of Plaintiff's briginig material factual issues to the Court's attention, and after a careful search by the Court for such, the Court considers this a proper case for summary judgment and further concludes that summary judgment should

be granted in favor of the Defendants for reasons which appear in detail in this memorandum.

This case is chiefly an attack on the EIS, and the Defendants of course claim that the EIS is adequate within its four corners. In seeking summary judgment, the Defendants rely upon the EIS, studies conducted by the Corps, and information and date compiled by the Corps. This material is before the Court and is, in effect, the administrative record, informal though it may be. See Camp v. Pitts, 411 U.S. 138 (1973). To oppose successfully the Defendants' motion for summary judgment, it was incumbent upon Plaintiff to meet the Corps'



material head-on and "set forth specific facts showing that there is a genuine issue for trial." Rule 56(e), F.R. Civ. P.; see Atlantic States Const. Co. v. Robert E. Lee & Co., Inc. of S.C., 406 F.2d 827 (4th Cir. 1969). Rule 56(e) provides, in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The Rule 56(e) reference to "specific facts" requires the opponent of summary judgment to "giv[e] body to" and

"augment the bald assertions" of his pleadings. Williams v. The Board of Eduration of The Countv of Kanawha (No. 75-1455, 4th Cir., Dec. 3, 1975). He must respond with substantial and concrete particulars to establish that there is a genuine issue for trial; general assertions are inadequate. Atlantic States Const. Co. v. Robert E. Lee & Co., Inc. of S. C., supra, 406 F.2d at 829; Waldron v. British Petroleum Co., 38 F.R.D. 170 (S.D.N.Y. 1965), aff'd sub nom., Waldron v. Cities Service Co., 361 F. 2d 671 (2d Cir. 1966), aff'd sub nom., First Nat. Bank v. Cities Service, 391 U.S. 253, reh. denied, 393 U.S. 901 (1968).



The instant case is not one which presents conflicting factual inferences of a material nature, nor is it a case where credibility (and therefore witness demeanor) appears to be an important factor. See Atlantic States Const. Co., supra, 406 F.2d at 828-29. In addition, de nova review is unwarranted. Instead, this case must focus on administrative action which was clearly documented prior to the start of this litigation. This appears then to be the type of case in which summary judgment procedures have especial utility. See generally Friends Of The Earth v. Coleman, 513 F.2d 295 (9th Cir. 1975); Bank of Commerce of Laredo v. City Nat. Bank

of Laredo, 484 F.2d 284 (5th Cir. 1973), cert. denied, 416 U.S. 905 (1974).

The affidavits and documents presented by Plaintiff are not enough to forestall the award of summary judgment to the Defendants. Plaintiff's materials, when applied to the gravamen of the complaint, do not show sufficient factual particulars to establish that there are genuine issues for trial. And Plaintiff has had sufficient time to discover and develop evidentiary data. The Court is convinced that a trial in this case would be a useless formality because there has been decidedly no showing that a trial would produce



any different or additional evidence. See Lundeen v. Cordner, 354 F.2d 401 (8th Cir. 1966). In sum, the Court is convinced to a legal certainty that Plaintiff has no triable controversy.[5]

The Standard of Review

The standard for judicial review of the informal agency action in this case is determined by Section 706 of the Administrative Procedure Act (5 U.S.C.). It is clear that neither application of the "substantial evidence" test, § 706(2) (E), nor de novo review, § 706 (2) (F), is authorized in this case. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413-17 (1971).[6] However,

here, as in all cases in which agency action is challenged, the action must be set aside if it is "arbitraty, capricious, an abuse of discretion, or otherwise not in accordance with law" (§ 706(2)(A)),or if the action fials to meet constitutional (§ 706 (2)(B)), statutory (§ 706(2)(C)), or procedural (§ 706(2)(D)) requirements. Overton Park, supra, at 413-14.[7]

In applying the applicable standards, the Court has "engage[d] in a substantial inquiry," conducting a "thorough, probing, in-depth review" to determine whether the agency action is in accord with the particular Congressional act, here NEPA. Overton Park, supra, 401 U.S. at 415.



The Court has especially noted the teaching of the Fourth Circuit which imposes upon "'District Courts ... an obligation to review substantive agency decisions on the merits'" in NEPA cases. Conservation Council of North Carolina v. Froehlke, 473 F.2d 664,665 (4th Cir. 1973). Accord, Fayetteville Area Chamber of Commerce v. Volpe, 515 F.2d 1021, 1024 (4th Cir. 1975).[8]

Finally, in its inquiry, the Court has followed the instruction of the Supreme Court that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."

Camp v. Pitts, 411 U.S. 138, 142 (1973). Accord, Fayetteville Area Chamber of Commerce v. Volpe. supra, 515 F.2d at 1024. The record of Corps action here, of course, is informal, but the Court has been furnished the EIS itself, together with the studies and data available to the Corps when the EIS was written, including comments obtained from appropriate governmental agencies.

General Background and Project Authorization

The history which ended with Congressional authorization of the Stonewall Jackson Lake Project is a matter of public record and is undisputed here.

Since early in this century the



United States Congress has been actively interested in a reservoir-lake project on the West Fork River, which is part of the Ohio River Basin.

In the 1920's Congress authorized the Corps to conduct a major study of the Ohio River Basin.[9] Results of the study were published in 1935. (H. R. Doc. No. 306, 74th Cong., 1st Sess. (1935).) The study included a comprehensive plan for developing the streams of the Ohio River Basin in respect to flood control, water power and navigation. The plan included the recommendation for a flood control reservoir on the West Fork River between Weston and Clarksburg, West Virginia. This particular reservoir

project was authorized by the Flood Control Act of 1936 (Act of June 22, 1936, ch. 688, §5, 49 Stat. 1570), and reaffirmed in the Flood Control Act of 1938 (Act of June 28, 1938, ch. 795,52 Stat. 1215). After "considerable sustained local opposition" to the site between Weston and Clarksburg, the Corps apparently assigned the project low priority status.[10] Further studies resulted from a flood control act approved in 1941 (Act of Aug. 18, 1941, ch. 377, 55 Stat. 638). That act sought a determination of "the advisability of constructing a system of multiple-use reservoirs" in the West Fork area. (Emphasis added.)

The Corps investigated seventeen



possible sites throughout the West Fork basin. The Corps concluded that a system or reservoirs was not advisable and recommended a single, alrge reservoir, for flood control and other purposes, on the West Fork with the dam near Brownsville, West Virginia, the current site. (H.R. doc. No. 491, 83d Cong., 2d Sess. 89, 146 (1954).) As a result of these studies the project initially authorized by Congress, i.e., the reservoir between Clarksburg and Weston, was placed in the inactive category in February 1961. (1966 Report, p. 15.)

On June 29, 1962, the United States Senate Committee on Public Works adop-

ing, providing water supply, et cetera, including construction of a system of multiple reservoir sites on tributaries in the West Fork Basin. The studies were completed with the recommendation that the Stonewall Jackson Lake Project be authorized. (The studies and recommendations appear in the Corps' 1966 Report, referred to above and made part of the record.)

The Stonewall Jackson project for flood protection, water quality control, water supply, and recreation in the West Fork basin was authorized for construction by the Flood Control Act of 1966 (Act of Nov. 7, 1966, Pub. L. No. 89-789, § 203, 80 Stat. 1405). With this Congressional authorization,

the Corps' Pittsburgh Engineer District initiated the preparation of the project's General Design Memorandum ("GDM") which was completed in January 1971, and is the basis for continuing planning and design. (See generally Cingle Dep.)

Land acquisition and construction is being delayed because the State of West Virginia has not signed a cost sharing agreement for the development of the project's recreation facilities. This agreement has been in the hands of West Virginia officials since April 18, 1973, when it was submitted in final form for execution and approval.[11] (Cingle Dep., pp. 25-26 & supp.)



Project Scope

The general site of the Stonewall Jackson Lake Project is Lewis County, West Virginia. The reservoir will collect water from a drainage area of 102 square miles. Plans specify a concrete gravity dam 620 feet long with a height above steambed of 95 feet. The dam site is near Brownsville, three miles south of Weston, and about 73 miles upstream from the mount of the West Fork River, a tributary of the Monongahela. At full pool, the reservoir will make a lake of 3,470 acres, although full pool will apparently occur infrequently. About 21,000 acres will be required for the project, including 1,140 acres for

recreational use. The project will eliminate 35 miles of free flowing stream. Apart from its flood control and recreational aspects, the project is also to improve water quality control and water supply for downstream areas. (EIS, pp. ii, 1.)

Total project cost, based on July 1974 prices, is estimated at $106 million. (Cingle Dep., p. 77.)

The Environmental Impact Statement

The EIS was prepared by the Corps' Pittsburgh District. A draft EIS was submitted to the Council on Environmental Quality on Septmeber 24, 1971. The final statement, consisting of 15 pages and several attachments totaling 14 pages, was submitted to the CEQ on



October 6, 1971. Before the Eis was submitted to the CEQ, a draft was sent to the following agencies for comment: Soil Conservation Service (U.S. Department of Agriculture); Department of Natural Resources (State of West Virginia); Bureau of Outdoor Recreation (U.S. Department of the Interior); Federal Water Quality Administration (Environmental Protection Agency); and The Appalachian Regional Commission. Before submission, the EIS was revised to conform to the comments of these agencies; the comments are attached to the EIS. (EIS, pp. ii, 11.)

THE COMPLAINT AND THE SUMMARY JUDGMENT MOTIONS

I. THE FIRST CAUSE OF ACTION.

For ease of reference the Court

will adopt the subject headings advanced by Plaintiff's Brief, considering them in turn.

Rule 7(b)(1), F.R. Civ. P., requires that a motion "state with particularity the grounds therefor." This provision applies to motions for summary judgment. 6 J. Moore, Federal Practice ¶ 56.14[1], at 56-354 (2d ed. 1976). Neither side in this case presented a motion document which conformed to the foregoing rule. This required the Court, particularly in Plaintiff's case, to examine the briefs for grounds which might support the motions. In this examination, the Court discovered that some of the particulars of Plaintiff's complaints



about the IES appear for the first time in its brief. The Defendants, however, raise no objection to the Court's consideration of these matters. While statements in briefs cannot be given the dignity of pleadings, the Court has considered everything in Plaintiff's brief, even though it is debatable whether all arguments advanced flow logically from Plaintiff's very general pleadings.

A. Alternatives.

Plaintiff's major claim appears to be that the EIS is imcomplete and defective because it fails to discuss a watershed project as an alternative to the single dam at Brownsville. (Plf.'s Interrog. Ans. 14(b)(1).)

Specifically, Plaintiff says that the NEPA and CEQ Guidelines were violated because the EIS "fail[ed] to analyze the watershed, its cost and its environmental impact." (Plf.'s Interrog. Ans. 15(e); see Interrog. Ans 16(a).)

Plaintiff supports a watershed program, arguing that such a program would not displace people, and unlike the proposed Stonewall Jackson dam, would not inundate a large area, destroying "timber, cemeteries, schools, churches [and] coal." (Plf.'s Brief, p. 7.)

The provisions of NEPA, 42 U.S.C. § 4332, applicable to alternatives, provide:

[A]ll agencies of the Federal



Government shall --

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsibel official on--

* * *

(iii) alternatives to the proposed action. ...

* * *

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources....

The pertinent 1971 CEQ Guideling, 6(iv), states:

A rigorous exploration and objective evaluation of alternative actions that might avoid some or all of the adverse environmental effects is essential. Sufficient analysis of such alternatives and their costs and impact on the en-

> vironment should accompany the proposed action through the agency review process in order not to foreclose prematurely options which might have less detrimental effects. (36 Fed. Reg. 7725, April 23, 1971)
> 12

Reduced to its simplest meaning, the NEPA requires that "a detailed statement ... on ... alternatives to the proposed action" be included in the EIS. Courts have widely held that "[a] rule of reason is implicit in this aspect of the law"; that is to say, only responsible and reasonable alternatives need be discussed. E.g., Natural Resources Defense Council, Inc., v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972). Accord, Fayetteville Area Chamber of Commerce v. Volpe, 515 F. 2d 1021, 1027-28 (4th



Cir. 1975).

It is undisputed that a watershed project, as such, is not listed as an alternative in the EIS. Five alternatives are considered: (1) no action, (2) flood plain management, (3) single reservoirs at a number of other sites, (4) channel improvement, and (5) diversion of waters of the Buckhannon River. (EIS, pp. 8-9.)

Parenthetically, it is necessary to define the term "watershed program". It appears reasonably clear from the record that the parties agree that a watershed program or project is basically a system of small dams. M. S. Holt, Jr., a civil engineer, in his affidavit (filed by

Plaintiff) states: "small dams as used in watershed projects [are] a good way to provide flood protection." Mr. Cingle, Chief of the Planning Branch of the Corps' Engineering Division in Pittsburgh, upon being deposed by Plaintiff, testified that: "Basically, a watershed protection project would consist of small dams." (Dep., p. 39.)

In this case the Court must examine the information amassed by the Corps prior to the filing of the EIS to determine why a "watershed program", as such, was not listed as an alternative. Corps studies of the West Fork area nearest in time to the EIS appear in the 1966 Report, which



the Corps prepared in response to the June 1962 resolution of the U. S. Senate Committee on Public Works. The 1966 Report includes studies and data about the following aspects of the West Fork basin: topography, hydrology, flood damage, geology, water quality and quantity, area economic development, natural resources, agriculture, and runoff and streamflow characteristics.

The 1966 Report also includes an extensive discussion of alternatives to the Stonewall Jackson dam, including the feasibility of a system of small dams in the West Fork basin:

17. ALTERNATE SOLUTIONS CONSIDERED

17-1. West Fork River basin

reservoirs. Extensive studies to determine the advisability of constructing a system of multiple-use reservoirs have been made. Investigation has been made of possible reservoir sites throughout the West Fork River system....[I]nvestigation resulted in the selection of 17 reservoir sites for study--three on the West Fork River and 14 on tributaries....

* * *

17-3. Studies to determine the advisability of constructing a system of single-purpose reservoirs for flood control for the West Fork River basin have also been made. Potential reservoir sites listed in the above tabulation were investigated. An examination of the economic aspects of these reservoirs indicated that none could be economically justified and that the cost to develop two or more reservoirs to form a system would far exceed the benefits that could be derived.[13]

17-4. In regard to water quality control, the Brownsville site is the most economical and best suited for a reservoir capable of providing the desired low-flow augmentation. Construction of an



alternate single-purpose reservoir on Polk, Stonecoal, Hackers, Freemans, Sycamore or Kincheloe Creeks or a system of small single-purpose water quality reservoirs on these streams capable of providing the required low-flow augmentation on a firm basis would be more costly that reservoir development at Brownsville. Reservoir development on Simpson, Elk, Tenmile, Bingamon or Booths Creek would not satisfy the needs of the basin bacause they would only affect the lower portion of the basin and also would not be desirable due to prevailing acid conditions of the streams. It also can be pointed out that in order to satisfy the water quality needs of the Weston area, reservoir development upstream from Weston is necessary. (1966 Report, pp.39, 42; emphasis supplied.)

The 1966 Report concluded (p. 51):

22-1. Best suited plan of improvement. A single reservoir on the West Fork River with the dam located at Brownsville would be more economically adaptable to multiple-use than any other single reservoir or system or reservoirs which might be provided in the West Fork River basin.... The

> [Stonewall Jackson] dam and reservoir ... represent[s] a project utilizing the site which yields the maximum net benefits attributable to the project purposes of flood control, water supply, water quality control and recreation....

Mr. Cingle, in response to questioning by Plaintiff's attorney, confirmed that the Corps had considered and rejected a system of small dams. Mr. Cingle testified:

> Our analysis of small dams would indicate that you could not provide the degree of flood protection for Weston and downstreams, that you could with the Stonewall project. (Dep., p. 39.)

The foregoing excerpts from the 1966 Report and the Cingle deposition make it clear that the Corps fully studied a system of smaller dams; the Corps, however, concluded that such a system was not a reasonable



alternative to the single dam site of the Stonewall Jackson Lake Project.

The Corps, in undertaking the authorship of the EIS, had the burden of meeting NEPA standards. But this does not mean that Plaintiff, in charging that the discussion of alternatives is inadequate, may rest upon the naked conclusion that a "watershed project" should have been listed in the EIS as an alternative.

Plaintiff has not pointed to any substantial particulars which would support its conclusion that a watershed project is a reasonable alternative to the Stonewall Jackson Lake Project. Plaintiff does offer two scant items on this issue: First, Mr.

Holt's unsupported statement that "watershed projects [are] a good way to provide flood protection" (Holt Aff't); and, second, a citation to page 285 of Plaintiff's Exhibit 3, the West Virginia Department of Natural Resources survey, which states:

> 7. Water Resourses Study staff members, SCS [Soil Conservation Service], Morgantown (West Virginia), in cooperation with the Forest Service and Economic Research Service, USDA, made water resource studies of eight additional watershed projects in the basin area as a part of their work on the Appalachia Water Resources Study. PL-566 projects were found to be potentially feasible in French Creek, Upper Buckhannon River, Sandy Creek, Three Fork Creek, Simpson Creek, Paw Paw Creek, Limestone Run, and Upper West Fork River. All but the last appear feasible for three or more purposes, including flood prevention. (Emphasis added.)

The above paragraph from the De-



partment of Natural Resources survey is speculative and conclusionary: it speaks only of potentialities and does not refer to supporting data or documentation. The paragraph is of very minor, if any, assistance to Plaintiff's cause for additional reasons. First, even giving Plaintiff the benefit of the doubt, it indicates that a watershed project on the West Fork River is "potentially feasible" for no more than two purposes, and it is not clear that flood control is one of those purposes. Congress had determined that the Stonewall Jackson project is needed for at least four specific purposes, including flood control. Second, it is significant

that neither the U. S. Department of Agriculture's Soil Conservation Service (which is dedicated to watershed projects) nor the Department of Natural Resources (which published the survey referred to above) suggested a watershed project as an alternative in their comments on the draft EIS. A fair reading of the comments of these two agencies indicates support for the Stonewall Jackson project.[14] Indeed, none of the state or federal agencies which commented on the EIS suggested or even mentioned a watershed program as an alternative. See Natural Resources Def. Coun., Inc. v. Tenn. Val. Auth., 367 F.Supp. 128 (E.D. Tenn. 1973), aff'd, 502 F.2d 852 (6th Cir.



1974).

Defendants, in their interrogatories numbered 5 through 13, sought to discover whether Plaintiff itself had taken any steps to determine the feasibility of a watershed program in the West Fork basin. Interrogatory 5 asked:

> When did plaintiff first begin to plan construction of a watershed project on or about the Upper West Fork River as alleged in paragraph 9 of the Complaint?

Plaintiff replied:

> In August of 1972 many of the late members of the corporation requested a watershed project through the West Fork Soil Conservation District and in May of 1973 an application was made for Federal assistance under the Watershed Protection and Flood Prevention Act which application was to see that a Watershed project was built if a feasibility study for such found

> that it was warranted. (Plf.'s Interrog. Ans. 5; emphasis added.)

Plaintiff admits that there have not been any actual feasibility studies, even now, of the watershed method it proposes. (Interrog. Ans. 11.) Moreover, there is no firm indication in the record as to when, if ever, such studies will be made.

In Interrogatory 12, Defendants asked for a description of the watershed project that Plaintiff proposes, including (1) "locations and areas of its drainage basins", (2) the "hydrologic and hydraulic characteristics of the watershed project", (3) "characteristicts of the watershed project", (3) "characteristics and locations of the structural and non-structural



components of the ... project", and (4) any "cost studies." Plaintiff answered: "We do not have this information at the present time." (Interrog. Ans. 12.)

The United States Senate Committee on Public Works, in its report accompanying the bill authorizing the Stonewall Jackson Lake Project, summarized the need for the project as follows:

> Flood problem.-- West Fork River and its tributaries overflow about once a year causing flood damage in the cities of Weston, Clarksburg, and Fairmont and in the smaller communities of Deanville, West Milford, Shinnston, Enterprise, Worthington, and Monongah. In addition, the uncontrolled discharges from the West Fork River contribute to downstream floods on the Monongahela River. Damages occur to industrial developments, commercial establishments, resi-

> dential properties, and cultivated lands. Rialroads, highways and utilities facilities are also adversely affected by floods. (Senate Comm. on Public Works, Public Works Authorizations, 1966, Rivers and Harbors--Flood Control and Multiple-Purpose Projects, S. Rep. No 1720, 89th Cong., 2d Sess. 57 (1966).)

The project is also for "water supply, water quality control, recreation and area redevelopemnt." (Id.)

Plaintiff has not advances anything substantial and dependable to indicate that the watershed idea is a reasonable or realistic alternative for meeting the Congressional objectives outlined above. The Corps, in its 1966 Report, considered and rejected a system of small dams (i.e., a watershed project). Plaintiff has not "set forth specific facts showing that



there is a genuine issue for trial" concerning whether a watershed project is a reasonable alternative. (Rule 56(e), F.R. Civ. P.) Accordingly, the Court concludes that the Corps' decision to omit a watershed project as an alternative in the EIS did not violate the applicable standards for agency action previously outlined in this memorandum.

B. Short Term Use Versus Long Term Productivity.

Plaintiff apparently claims this juncture that the EIS does not satisfy NEPA, 42 U.S.C. § 4332(C)(iv) which requires "a detailed statement by the responsible official on ... the relationship between local short-term uses of man's environment and the

maintenance and enhancement of long-term productivity." This provision, according to CEQ Guideline 6(a)(v),

> ... in essence requires the agency to assess the action for cumulative and long-term effects from the perspective that each generation is trustee of Fed. Reg. 7725 (1971).)

In addition, CEQ Guidline 5(c) interprets NEPA to mean:

> ... that adverse significant [environmental] effects include those that ... serve short-term, to the disadvantage of long-term, environmental goals. (Id.)

In its brief (pages 7-8), Plaintiff claims that the short-term/long-term use discussion in the EIS (par.6) is deficient for several reasons which are considered in sequence.

First, Plaintiff charges that the Corps has no basis for stating in the



EIS (page 10) that "a continuing gradual decline [in the project area] was indicated." The record establishes an undisputed factual basis for the statement. The Corps' 1966 Report reveals that the 1960 Census showed that population in the West Fork River basin area declined 10.7% in the decade between 1950 and 1960. (1966 Report, p. 23.)[15] More improtantly, the indication of a "gradual decline" in the area was immediately followed in teh EIS by a direct acknowledgment that the decline could end at any time, even in the absence of the dam project.

> This decline could possible be retarded or even reversed as a result of Interstate 79. Either case, however, pertains to the immediate future, for population

> pressure will eventually require more intensive use of the 33 square mile area. (EIS, p. 10.)

Second, the Plaintiff attacks the EIS conclusion that "[t]he long term productivity of the area would be enhanced by the development of recreational areas." (EIS, p.10.) Plaintiff states that "the proposed project will be made into another state park which plaintiff believes will be non profitable--- in light of the fact that only two of our state parks are profitable."[16] (Emphasis added.) Further, "[i]t is plaintiff's position that due to the energy crisis and recession there may be less use made of our state parks than projected in the EIS." (Plf.'s Brief, p.7; emphasis



added.) Apart from being based on mere "belief" and speculation, these assertions conveniently overlook several undisputed factors:

(1) The Corps does not promise that the operation of the park aspect of the project will turn a profit for West Virginia's treasury. Indeed, before construction begins, the State must agree to "bear all costs of operation, maintenance, and replacement of recreation facilities, the amount involved currently being estimated at $64,000 annually during the initial life of the project and $130,000 annually under conditions of full realization of the recreation potential of the project." (1966 Report, p. 71.)

(2) The EIS indication that the park aspect of the project will enhance long-term productivity of the area clearly looks beyond the issue of recreational profitability to the state. The EIS indicates that because of the project's convenient location "substantial recreation-oriented services in the vicinity" could be generated. (EIS, p.5.) This is an obvious reference to private enterprise.

(3) The discussion of long-term productivity in the EIS goes far beyond recreational aspects of the project. For example, water supply is emphas ized:

> [F]uture productivity of Clarksburg and Weston, West Virginia, will be affected by water supply for commercial and individual users. Based on two drought years, 1930 and 1953, and 1970 population, needs exceed supply available from natural flow and existing facilities for the city of Weston at present, and for Clarksburg in 1985. If these areas are to be productive, additional water supply is necessary. Demands to the 2010 could be met by the proposed project. (EIS, p. 10.)



Plaintiff does not dispute the Corps' projections about water supply requirements.

Third, in its attack on the short-term/long-term use discussion in the EIS, Plaintiff claims that there was a failure "to balance expected project benefits ...against the permanent loss of free-flowing streams.'" (Plf.'s Brief, p. 8.) It goes without saying that expected project benefits are stressed in the EIS. How-

ever, a fair reading of the EIS as a whole reveals a reasonably balanced discussion between benefits and drawbacks. Loss of free flowing streams is discussed:

> [T]he loss of about 35 miles of free flowing streams will result from project construction. (EIS, p.4.)

* * *

> Although the complete loss of any particular species of plant of animal life is not expected, it is realized that the inundation of wildlife habitate and free flowing stream will have an impact aesthetically. (EIS, p. 5.)

* * *

> Approximately 12 miles of stream fishing will be eliminated.... The ecological systems functioning within the stream and along its banks will be exchanged for systems associated with a slack environment. (EIS, p. 7.)

Fourth, Plaintiff claims that the



EIS "fails to balance expected project benefits '...against ... the eventual uselessness of a dam as silt accumulates.'" This is an apparent attempt to elaborate on Interrogatory Answer 14(b)(11) in which Plaintiff says that the EIS "is felt to be incomplete because ... [it] fails to discuss siltation problems in the porposed lake." The Corps makes no claim that the dam will last forever. Benefits are projected for a period of 100 years;[17] and Plaintiff offers nothing of significance to show that siltation will make the dam useless prior to that time.[18]

Finally, on the subject of short-term/long-term use, Plaintiff attacks the EIS arguing that is "fails to dis-

cuss fully the effect on coal." Expressing a belief that "coal mining will increase," Plaintiff asserts that "[t]he EIS did not contemplate the energy crisis." (Plf.'s Brief, p. 8.)[19]

Plaintiff bases its comments about coal on the affidavit of Dr. S. Thomas Bond, an inorganic chemist who studies geology as a hobby. In his affidavit, Dr. Bond estimates tht extent of coal reserves in Lewis County, West Virginia and predicts that the "demand for coal will continue to increase indefinately [sic] in the future." (Aff't, p. 7.) Dr. Bond is carefull to concede that there is little mining activity in the area at present.



Plaintiff contends that "with the treatment of coal in the EIS, [it] is entitled to a summary judgment, especially in light of the affidavit of Dr. Thomas Bond." (Plf.'s Brief, p. 8.) The point of Dr. Bond's affidavit (page 7) is this: "If the dam is placed, part of the true cost of it is the coal." Dr. Bond's affidavit does not run counter to the Corps' treatment of coal. Before the EIS was prepared, the Corps computed the coal reserved in the project area; and the coal was included as a cost in figuring the project's cost-benefit ratio. Moreover, as Mr. Cingle indicated in his deposition, the Corps is fully aware "that there has been a substantial increase of the value of coal,"

and the Corps continues to refine the real estate costs (including coal) for this project. (Cingle Dep., pp. 76-78.)

Plaintiff's comments about coal ignore certain information it obtained in discovery. Mr. Cingle testified that mineral reserves, including coal, would

> not [be] lost completely. If a situation were to occur then in a national interest to provide, or recover some of these particular resources, then a program could be developed for their recovery.
>
> * * *
>
> [I]f it was such in a national situation [sic], or it be imperative that it would be mined, then we would provide a program. (Cingle Dep., pp. 20-21.)

On the basis of extensive studies, including appraisal and some core



drilling near Brownsville, the Corps included the following in the EIS on coal:

> Coal stripping and mining operations are characteristic of this part of the West Fork River Basin. Commercial activity within the project area has practically ceased.... Active production continues upstream from the project area, where reportedly 60 percent of the mineable coal remains. (EIS, p. 2.)

In light of the foregoing analysis of the coal resource in the EIS and the inclusion of coal as a cost in the cost-benefit ratio in the EIS, the affidavit of Dr. Bond does not establish that there is a "genuine issue for trial" concerning the treatment of coal. Indeed, nothing in the record suggests that coal was given a shoddy or inadequate evaluation.

C. Public Involvement.

In its Interrogatory Answer (14(c), Plaintiff states:

> The E.I.S. is felt to be misleading because of the following:
>
> * * *
>
> 2. On page 11 of the E.I.S. nearly one-half page is devoted to public participation in the decision to proceed with the Stonewall Jackson Lake project but it fails to mention that the project was not the same. It is also misleading because there was no public participation in the revision of the draft E.I.S. to the final E.I.S. It is also misleading because the closest any of these hearings were was in Clarksburg.

Plaintiff's complaints about the public hearings are misplaced because neither the NEPA nor the CEQ Guidelines make public hearings a mandatory procedural requirement in the preparation of an environmental impact statement.



Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275, 1284-85 (9th Cir. 1973).

It is undisputed that five public hearings were held between 1941 and 1964. All hearings dealt with proposed reservoir construction in the West Fork River basin. The last three hearings specifically dealt with the Brownsville site; and at the final hearing, held in Clarksburg, West Virginia, on December 2, 1964, the plan for the presently authorized project was presented. (1966 Report, pp. 33-34.)[20] Three of the five public hearings were held in Clarksburg, which is within easy travelling distance from the area to be inundated; the

September 24, 1954, hearing was held in Weston, which is about three miles from the dam site. (1966 Report, pp. 33-34; see EIS, p.1.)

As noted, Plaintiff charges that "there was no public participation in tne revision of the draft E.I.S. to the final E.I.S." This charge raises no issue for trial because the NEPA itself does not require that a draft EIS be prepared and filed. (Here, of course, a draft was filed and circulated among appropriate governmental agencies.)

Plaintiff's complaints about lack of public involvement in the revision process are an obvious effort to get this Court to turn back the clock on



the EIS preparation process. Plaintiff states that its "legal existence had not been created until many months after the final impact statement was prepared." Plaintiff further claims that its "members were not even aware of environmental impact studies until plaintiff's counsel, who was not admitted to practice until May of 1973 and not aware of the project until sometime thereafter, asked plaintiff's members if such had been prepared." (Plf.'s Brief, p. 8.) None of this gives the Court a valid reason to invalidate the EIS. The fact that Plaintiff failed to participate as an entity in the EIS preparation process does not prevent Plaintiff and its

members from addressing their recently expressed concerns to Congress, the body which determined that the dam is needed.

D. Permanent Commitments of Resources.

Plaintiff claims that:

> the section of the E.I.S. entitled "Any Irreversible and Irretrievable Commitments of Resources Which Would be Involved in the Proposed Action Should It Be Implemented" is incomplete and does not provide for full disclosure. (Plf.'s Brief, p. 9; see also, Plf.'s Interrog. Ans. 14(b)(8).)

Specifically, Plaintiff believes that the EIS does not completely discuss alleged losses of coal, gas and oil resources. (Plf.'s Brief, p. 9.) Section 7 of the EIS clearly concludes that the commitment of re-



sources in the project area will be "for the life of the project', which is estimated to be 100 years.

The Court has previously indicated in this memorandum that the EIS adequately deals with coal and that discussion need not be repeated here.

The effect on natural gas resources is fully discussed in Sections 2 and 3 of the EIS:

> Development of natural gas resources began about 1900, and has continued to the present. Some of the wells have been exhausted, but some of these are still used for storage of gas obtained locally as well as that transported from other states. The Equitable Gas Company has a large, active compressor station in the Skin Creek Valley well below the impoundment level. (EIS, p. 3.)

* * *

Active and inactive gas wells below

> the lake full pool elevation will be plugged; gas injection and recovery wells and gas storage observation wells will be protected and provided with access; a gas compressor station in the valley will be relocated.... (EIS, p. 4.)

The record is devoid of any indication that oil is an important resource in the project area.

It is undisputed that coal and gas reserved (and oil to the extent it exists) in the project area are "not lost completely", and thus not irreversibly or irretrievably committed. As noted earlier in this memorandum, if the national interest ever requires it, a program to recover these resources can be developed after the project is completed.[21] (Cingle Dep., pp. 20-21.)



In any event, Plaintiff has offered nothing of substance to raise a material issue about inadequate treatment in the EIS of resource losses caused by the project. It is undisputed that the coal, gas and oil is treated as a cost in the cost-benefit ratio appearing in the EIS. (Cingle Dep. 20-22, 76-78.) The wisdom of a project which places certain resources beyond reach is not for the Court to consider. That is the responsibility of the ultimate decision maker -- in this case, the Congress. Cf. Environmental Defense Fund, Inc. v. Froehlke, 368 F. Supp. 231, 240-41 (W.D. Mo. 1973), aff'd sub nom., Environmental Defense Fund, Inc. v. Callaway, 497 F.2d 1340

(8th Cir. 1974); Cape Henry Bird Club v. Laird, 359 F. Supp. 404, 412-13 (W. D. Va.), aff'd, 484 F.2d 453 (4th Cir. 1973).

D. Comments.

The NEPA, 42 U.S.C. § 4332(C), clearly provides that an EIS must be accompanied by "the comments and views of the appropriate Federal, State and local agencies, which are authorized to develop and enforce environmental standards." (Emphasis added.)

Plaintiff claims that the foregoing provision required the Corps to solicit comments from the West Virginia Department of Agriculture.[22] (See Plf.'s Interrog. Ans. 14(d)(4), 14(f)(2), 15(a), 15(c) and 16; Plf.'s



Brief, p. 10.)

It is clear that comments and views need only be obtained from state agencies "which are authorized to develop and enforce environmental standards." The Plaintiff has cited nothing to the Court which would indicate that the West Virginia Department of Agriculture is authorized to develop and enforce environmental standards. And the Court, in its own research, has found nothing to indicate that the West Virginia Department of Agriculture has any general regulatory authority in the environmental field. (See generally W. Va. Code, Chapter 19.) Accordingly, the Court concludes that the NEPA did not impose

any duty upon the Corps in this case to solicit comment from the West Virginia Department of Agriculture.[23]

E. Scientitic Literature.

In Interrogatory Answer 14(b)(2), Plaintiff charges:

> The E.I.S. is felt to be incomplete because ...[s]cientitic conclusions in the E.I.S. are not supported by references to relevant literature or field studies.

In its brief, Plaintiff fails to cite any case law for the proposition that the EIS must cite scientific literature and refer to field studies. Also, Plaintiff rather curiously fails to claim that any particular scientific conclusion is faulty. The record here establishes that the EIS is underpinned by a diligent, good faith research effort by the Corps, which



utilized effective scientific methods. See Environmental Defense Fund v. Hardin, 325 F. Supp. 1401, 1403 (D. D.C. 1971). It is well settled that supporting studies and technical references need not be included in the EIS. However, these items should be available and accessible. Trout Unlimited v. Morton, 509 F.2d 1276, 1284 (9th Cir. 1974); Life Of The Land v. Brinegar, 485 F.2d 460, 468-69 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974). Details of Corps studies concerning the project appear in the General Design Memorandum, dated January 1971. The GDM is, and has been, available at the public library in Weston, West Virginia, near the

proposed dam site. (Cingle Dep., p. 13.) Detailed accounts of Corps studies and field investigations made for this project a-pear in another public document, the 1966 Report.

F. Paragraph 14.

In the section of its brief entitled "PARAGRAPH 14", the Plaintiff concludes with an assortment of claims which expand upon paragraph 14 of the complaint, which reads:

> The Environmental Impact Statement is as follows: vague; incomplete; misleading; erroneous; filed with perfunctory and conclusionary language; a non-reviewable environmental record in its present form; and /or in noncompliance with the requirements of 42 U.S.C. §§ 4321 et. seq., and the guidelines preprepared by the Council on Environmental Quality.

Plaintiff quarrels with the EIS'



use of the 1950 flood as an example of the fact that the "Weston and Clarksburg, West Virginia ... areas were damaged at least 15 times by floodwaters between February 1950 and December 1969." (EIS, p,4; see Plf.'s Interrog. Ans. 14(c)(1).) The EIS continues:

> In 1950, for example, in the Weston area alone, four industries, 167 commercial establishments, 595 residential dwellings, 9 churches and 10 schools suffered damages totaling more that two million dollars. (EIS, p.4.)

According to Plaintiff, the 1950 flood is a misleading example because it was the worst flood of the century. However, reference to the 1950 flood is not misleading in light of the Corps' flood damage studies. At least

one other flood of record, the July 1888 flood, was of a force nearly equal to the 1950 flood. In the 1966 Report the Corps estimates that a flood similar to the July 1888 flood would cause damages of "about $1,539,000 in the Weston damage district." (1966 Report, p.31.) Also not to be overlooked is the fact that the total average annual flood damage in the "Weston damage district" is estimated to be $656,200.00. (GDM, App. XIV, p.)[24]

Plaintiff also claims that citing the 1950 flood is misleading because since that time watershed projects have been completed on two streams near Weston, Polk Creek and Stonecoal Creek. These projects, according to



Plaintiff, should reduce flooding in Weston. Plaintiff, however, offers no hydrological or other technical data to support its assertion. Accordingly, the Corps' conclusion, based on flood damage data, that the two projects do not change the "potential damages" picture is not challenged with dependable particulars. According to the Corps, the work on Polk and Stonecoal Creek "cannot eliminate flooding in Weston" because those projects "only have an effect on a very small portion of the drainage area." (Cingle Dep., pp. 37-39, 46-47, 59-60.)

Accordingly, the Court concludes that the reference to the 1950 flood in the EIS is not misleading.

Plaintift appears to claim (Brief, p. 12) that the EIS is misleading in its statement that "[a]pporximately 280 acres of rural land will be completely protected from flooding" (EIS, p.4) because the project will cause ,000 acres of crop land and 5,500 acres of pasture land to be condemned. This argument is frivolous because, as noted earlier in this memorandum, the EIS is quite frank in explaining the project's adverse effect on agricultural production in Lewis County. (See footnote 23, supra.)

Plaintiff claims that the statement in the EIS, page 7, that "Skin Creek and Sand Fork are periodically dry during the summer" is erroneous.



Plaintiff counters with the Parker statement that "the only times these streams are known to have been dry is during a drought." (Parker Aff't, p. 3.) Initially, the statement about the two streams is taken out of context by Plaintiff. In context, it appears in the EIS as follows:

> Approximately 21 miles of stream fishing will be eliminated. (Fishing under present conditions is mostly limited to the West Fork River, since the major tributaries, Skin Creek and Sand Fork are periodically dry during the summer.) (Emphasis added.)

Plaintiff in no way disputes the inference that fishing is poor on major tributaries. Moreover, there seems to be no material difference between the statement in the EIS and the statement of Mr. Parker.

According to the EIS, "[t]he Stonewall Jackson Lake project is planned as one of the largest State parks in the [West Virginia] park system" (Page 5). Plaintiff asserts that the EIS erroneously claims (Brief, p. 12) that the "long term productivity of the area would be enhanced by the development of" the park area. (EIS, p. 10.)[25] In attacking this particular EIS statement, Plaintiff cites only a June 18, 1974, letter (Spray Aff't, Exh. B) written by the Director of the West Virginia Department of Natural Resources. The Director's letter indicates the following: (a) three West Virginia state parks are profitable in normal years of operation; (b) monthly



interest on revenue bonds sold for park improvement is $64,482.00; (c) in fiscal 1973, the state spent $1,358,43.00 in operating state parks; and (d) 5,071,306 people used the state parks in 1973. The Director's letter does not present "facts showing that there is a genuine issue for trial." (F.R. Civ. P., 56(e).) Nothing in his letter materially cuts against the EIS statement that the park aspect of the project will enhance the "long term productivity of the area." Plaintiff appears to be saying that state parks are unprofitable and a financial drain on the state treasury. However, the EIS unquestionable goes beyond this limited issue in its presentation of

the economic question. The EIS clearly speaks of enhancement of the private sector of the economy:

> The anticipated tourist trade will create increased demands for servised, and open many opportunities for new commercial enterprises. (EIS, p. 6.)

* * *

> Interstate 79 could generate substantial recreation-oriented services in the vicinity. (EIS, p. 5.)

In any event, the issue of profitability is not one for this court to consider.

The concluding attacks on the EIS in Plaintiff's brief relate to the following allegations which first appear in Pliantiff's Interrogatory Answer 14(b):

> 3. The E.I.S. fails to give the effect of flow fluctuation on downstream biological productivity and stability.
>
> 4. The E.I.S. fails to give the effect of the intrusion of other fish species.
>
> 5. The E.I.S. fails to give the effects of impoundment of existing food chains and downstream alluvial deposits.
>
> 6. The E.I.S. fails to thoroughly give the effects of reservoir drawdowns on shoreline vegetation.

These alleged deficiencies are lifted almost verbatim from those listed by the plaintiff in the so-called Gillham Dam case, Environmental Defense Fund v. Corps of Eng. Of U.S. Army, 325 F. Supp. 728, 747-48 (E.D. Ark. 1971). Apart from the fact that the geography of the area surrounding the Gillhan Dam site is quite different from the Stonewall Jackson dam site, Plaintiff

here fails to advance any factual support for its assertions. In the Gillham Dam case, the four assertions were supported by considerable expert testimony. This Court must not invalidate an EIS on the strength of bald assertions borrowed from another case. Moreover, the four contentions are dealt with in the EIS to the extent they are applicable to the present project.[26]

To summarize the judicial survey of the challenged EIS, the Court is satisfied that the EIS is adequate and meets the full-disclosure standards and requirements of NEPA. The affidavits and documents submitted by Plaintiff totally fail to "set forth



specific facts showing that there is a genuine issue for trial". (Rule 56(e), F, R. Civ. P.)

A full study of the EIS (including its attachments) and the entirety of the record clearly show that the potential environment impacts were thoroughly revealed and discussed and that the bases for the various conclusions in the EIS are suffeciently documented. In particular, the range of alternatives considered is adequate. The main text of the EIS is concise and in easily readable form, which should give any non-professional an understanding of the project's environmental impact. The supporting material, particularly the 1966 Report and the

GDM, provide the more inquisitive or sophisticated reader with a detailed technical basis for the conclusions in the EIS. Accorgingly, the Court concludes that the EIS is a document upon which a decision maker could arrive at an informed determination.

II. THE SECOND CAUSE OF ACTION.

The issues presented in the second cause of action have not been seriously advanced in these summary judgment proceedings. The gist of this cause of action appears in paragraph 19 of the complaint:

> The decision of the defendants to undertake the said project is not in substantial compliance with the goals Congress declared in 42 U.S.C. 4321 et seq.

To keep the ultimate issues in



proper perspective, it must be noted that it was not the nominal Defendants who made the basic decision to undertake the complained of project. It was the Congress, after many years of study, who determined that the Stonewall Jackson Lake Project should be initiated.

In response to Interrogatory 18(a) Plaintiff says that the project violates the Congressional goals which appear as follows in 42 U.S.C. § 4331(b)(3) and (4):

> it is the continuing responsiblilty of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Fereral plans, functions, programs, and resources to the end that the Nation may--
>
> * * *

> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
>
> (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice; ...

In Interrogatory 18(b), Defendants asked:

> What is the factual basis for plaintiff's conclusion that the decision to undertake the project violated the goals of Congress.

Plaintiff responded:

> 1. It is the plaintiff's belief that a watershed project in the proposed affected area would attain many of the benefits attributed to the dam but it will not inundate the political, social, economic and historical background of the affected inhabitants.
>
> 2. The dam would remove existing archaelogical [sic] sites and other places of historical signifi-

please note page 97 missing in original copy

EIS also assesses the project's effect on the social and cultural setting of this area;

> Four small towns will be affected by the development, Roanoake, [sic] Vandalia, Brownsville and Walkersville. Roanoke is the largest, with a population of around 100. Improvements in the valleys include one active school, five churches, ten commercial establishments and a fire hall. The population in the towns is about one-third of the total population in the project area. (EIS, p. 3.)

* * *

> Some of the area inhabitants who are requered to move from the project area will resettle in the vicinity. Those who at present support themselves in vocations other than farming will very likely keep their jobs, unless project operation or occupations satellited on operation of the project offer better opportunities. On the other hand, it is not as likely that induviduals engaged in agricultural pursuits will re-establish themselves on farms, both because of the relative scarcity of good



> farmland, and the probable reluctance to start over again.... The project will cause a change in the social life of the area. Small rural communities and scattered farms will give way to a large transient population looking for recreation and relaxation. (EIS, p. 6.)

The EIS clearly apprised Congress of the project's impact on the inhabitants of the area and openly acknowledged the effect on the social and cultural setting. Congress has specifically declared that NEPA policy be carried out in a manner "consistent with other essential considerations of national policy." (42 U.S.C. § 4331(b).) Congress had the facts; it thereupon decided the policy questions and voted to establish the lake.

Plaintiff's "Second Cause of Action"

raises no triable issue.

III. THE THIRD CAUSE OF ACTION.

The crux of Plaintiff's third cause of action is as follows:

> The defendants proceeding forth with said project and with the attached Environmental Impact Statement violates the rights of the plaintiff as guaranteed by the Fifth and Ninth Amendments to the United States Constitution and by [42] U. S.C. 4321 et seq. (Compl., par. 20.)

The Court has determined earlier in this memorandum that NEPA, 42 U.S.C. § 4321 et seq. has been complied with in this case. In addition, this Court has previously held, and holds here, that claims about environmental degradation cannot be elevated to Constitutional levels. Hagedorn v. Union Carbide Corporation, 363 F. Supp.



1061, 1064-65 (N.D. W. Va. 1973). Accord, Ely v. Velde, 451 F. 2d 1130 (4th Cir. 1971). Therefore, the third cause of action also falls short.[27]

Finally, some brief observations are needed to fully conclude the Court's review of the questions presented in this litigation.

First, it appears to the Court that Plaintiff's aim is simply and solely to stop the Stonewall Jackson Lake Project. After studying in detail all the material offered by Plaintiff, including its brief, the Court is convinced that Plaintiff will always oppose any determination that the lake be established as planned. The broadsides directed at the EIS, many of

which lack even one whit of arguable support in the record, demonstrate that Plaintiff's real complaint goes not to the adequacy of the EIS itself, but to the merits of developing a federal reservoir and recreation project which will consume 21,000 acres in Lewis County, West Virginia.

Of course, the Court does not belittle the concerns of those who will be displaced if the project becomes a reality. Neither has the Corps minimized these concerns, as the EIS indicates:

> Development of the project will have a negative effect on many of the present human inhabitants. In other similar areas, the loss of homes, churches and cemeteries, hallowed by close and sometimes traditional association, has generated understandable protest. The



> loss is irrevocable because the original is destroyed. (EIS, p. 7.)

Second, even though Plaintiff's case necessitated a tedious and time-consuming analysis of the EIS and the remainder of the record, it is abundantly clear that the Courts are not the place to stop or alter public works projects.

Third, NEPA, in a case such as this, does not empower the courts to pass on the substantive merits or demerits of federal projects and thereby to politically second guess Congressional action. Instead, the nearly exclusive purpose of NEPA is to assure that the responding federal agency, in this case the Corps, makes full and responsible disclosure of environmental

factors to Congress, or in a given case, some Fxecutive Branch decision maker.

Finally, the best, most acceptable, plan for providing flood control and utilization of water resources in the West Fork basin was a judgment matter exercised here after long and detailed study by the Congress, and this Court must not, under such circumstances as here presented, interpose its judgment. If the decision to construct the Stonewall Jackson dam is reversed or modified, this must be solely by action in the Congress.

For the reasons appearing in this memorandum, it is

ORDERED that the Clerk of this



Court file the document entitled West Fork River and Tributaries, West Virginia, S. Doc. No. 109, 89th Cong., 2d Sess. (1966); it is further

ORDERED that summary judgment be, and is, entered in favor of the Defendants and against the Plaintiff; and it is further

ORDERED that this action be, and is, dismissed and retired from the docket of this Court.

ENTER: May 3, 1976

/s/ Robert E. Maxwell
United States
District Judge

FOOTNOTES

[1] Plaintiff also seeks to have the Court determine that the project is being carried out in violation of the Fifth and Ninth Amendment rights of its members.

[2] The November 21, 1975, order, in its entirety, is as follows:

O R D E R

Upon receiving the Court's order entered on November 7, 1975, counsel for the plaintiff and defendants have conferred and have agreed that in lieu of the hearing scheduled for November 21, 1975, the issues raised in this litigation can be submitted to the Court for decision by way of cross-motions for summary judgment. Based upon the agreement of counsel and the Court perceiving no objection, it is therefore

ORDERED that the hearing previously scheduled for November 21, 1975 is cancelled. 'It is further



ORDERED that the defendants shall file their motion for summary judgment with brief in support thereof on or before December 15, 1975 and that the plaintiff shall file its cross-motion for summary judgment and brief in support thereof on or before December 31, 1975.

ENTER: November 21, 1975

/s/ ROBERT E. MAXWELL
United States District
Judge

Endorsement of Counsel:

/s/ LaVerne Sweeney
Attorney for Plaintiff

/s/ William A. Kolibash
Attorney for Defendants

[3] On November 17, 1975, the four amici curiae organizations moved for an order permitting them "to participate in all further proceedings" in this case. The motion was served on all counsel and, receiving no ob-

jection from either side, the Court, on November 24, 1975, entered an order permitting the four organizations to participate in this case as amici curiae. The four organizations support the lake project and urge that summary judgment should be awarded to the Defendants.

[4] An EIS may be amended or supplemented if the amendment or supplement is "subjected to the ... comment and review procedures outlined by Section 4332(2) (C) of NEPA." Natural Resources Defense Council, Inc. v Morton, 337 F. Supp. 170, 172 (D. D.C. 1971).

[5] In reaching this conclusion the Court has been mindful of the



principle that "any doubt as to the existence" of a genuine issue of fact must be resolved against the party seeking summary judgment. The "[b]urden is upon the party moving for summary judgment to demonstrate clearly" that no such issue exists. Phoenix Savings and Loan, Inc. v. Aetna Casualty & Sur. Co., 381 F.2d 245, 249 (4th Cir. 1967).

[6] 5 U.S.C. §706(2) (E) and (2) (F) have limited applicability, as explained in Overton Park, supra, 401 U.S. at 410-417.

[7] The applicable portion of the Administrative Procedure Act provides:

§706. Scope of review

To the extent necessary

to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

* * *

In making the foregoing determinations, the court shall review the whole



record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. (42 U.S.C. &706.)

8

The Fourth Circuit's call for "review ... on the merits" requires the Court to proceed cautiously because of the Supreme Court's stated limits on review under 5 U.S.C. §706 (2) (A):

> Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The Court is not empowered to substitute its judgment for that of the agency. (Overton Park, supra, 401 U.S. at 416).

The use of the phrase "review on the merits" and what it means in NEPA cases are a source of much confusion. See,

e.g., Environmental Def. F., Inc. v. Corps of Eng. Of U.S. Army, 492 F.2d 1123, 1139 (5th Cir. 1974); Environmental Defense Fund v. Corps of Eng. U. S. Army, 470 F.2d 289, 299, n. 15 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973); National Helium Corporation v. Morton, 486 F.2d 995, 1006 (10th Cir. 1973) (concurring opinion), cert. denied, 416 U.S. 993 (1974).

[9] Specifically, the study was authorized pursuant to Corps' recommendations appearing in House Document No. 308, 69th Cong. 1st Sess. (1926). This authorization was formalized in the Rivers and Harbors Act of 1927 (Act of Jan. 21, 1927, ch. 47, § 1, 44 Stat. 1010), and reemphasized in the



Flood Control Act of 1928 (Act of May 15, 1928, ch. 569, § 10, 45 Stat. 534.

[10] H. R. Doc. No. 491, 83rd Cong. 2d Sess. 4, 9 and 146 (1954).

[11] By letter to the Corps, dated July 7, 1970, West Virginia Governor Arch A. Moore, Jr., stated that "[i]t is the intention of the State of West Virginia to participate in the recreational developemnt of the project and to assume the responsibility for its operation and maintenance...." (GDM, Exh. A) The formal commitment, however, has not been made; in its brief (p.4) the Government states, "To date, no word has been received from the State of West Virginia as to when the

recreation cooperation agreement will be approved."

[12] CEQ Guidelines "are advisory, not mandatory." Continental Ill. Nat. B. & T. Co. of Chicago v. Kleindienst, 382 F. Supp. 107, 114 (N.D. Ill. 1973). Accord, Sierra Club v. Lynn, 502 F. 2d 43, 58 (5th Cir. 1974), cert. denied 421 U. S. 994 (1975).

[13] Data on the flood water storage capacities of the dams in the multiple-site reservoie system considered by the Corps appears in the 1966 Report, pp. 40-41.

[14] The Soil Conservation Service was specifically established to assist in carrying out the "delcared ... policy of Congress to provide per-



manently for the control and prevention of soil erosion and thereby to preserve natural resources, control floods, [etc.]." (The Soil Conservation Act of 1935, 16 U.S.C. 590a.)

[15] The November 1975 Review reports 1970 Census figures showing that the population in Lewis County (the site of the dam) dropped 9.5 per cent between 1960 and 1970, and the population in Harrison County, the next county downstream from the dam, declined 6.2 per cent in the same period. (Page 26.) Plaintiff does not dispute these figures. The record does not indicate whether the 1970 Census figures were available to the Corps in October 1971 when the final EIS was filed.

[16] Plaintiff's discussion about the profitability of parks relies on a letter from the Director of the West Virginia Department of Natural Resources (Spray Aff't, Dec. 29, 1975, Exh. B.) The letter indicates that three state parks "operate at a profit during the normal years of operation."

[17] The General Design Memorandum consistently speaks of a "100-year project life" (GDM, App. XII, p. 11; see GDM App. XI, p. 16; GDM, App. I, p. 2); and a supplement accompanying the 1966 Report (p. x) estimates the project's "average annual cost" over "a 100-year project life."

[18] Plaintiff says that it bases



its comments about siltation on "books critical of Corps projects" and Exhibit 7 is the affidavit of M. S. Holt, Jr., and that affidavit makes no mention whatever of siltation. Plaintiff's Exhibit 6, the affidavit of Dr. S. Thomas Bond speaks briefly of siltation. Plaintiff's Exhibit 6, the affidavit of Dr. S. Thomas Bond speaks briefly of siltation, but Dr. Bond's comments about siltation raise no material issue in this litigation. In sum, Plaintiff has not established that siltation is an issue.

[19] See also, Plaintiff's Interrogatory Answer 14(b) (8) which states:

> The E.I.S. fails to discuss the impact on the existing resources, including

> coal, which will be irretrievably lost, and the nature of each such loss.

20 According to the 1966 Report (p. 34), the December 2, 1964, hearing in Clarksburg, "was well attended"; and, "a few objections [were raised] by affected landowners to the project."

21 Also, Plaintiff does not contest the fact that certain gas or oil wells in the project area will continue in production if the project is completed. Mr. Cingle supplemented his deposition with the following sworn statement:

> [T]here are 52 known oil, gas, storage and abandoned wells and dry holes below full pool. Of these 52, 15 have been satisfactorily plugged and abandoned; 30 will be plugged;



> and 7 active wells will be intermittently inundated but will be adjusted to accomodate the full pool of the project so that production can be continued. (Supp. to Cingle Dep., p. 4.)

22 Comments were obtained from the West Virginia Department of Natural Resources. (See EIS, pp. 13-14 and attachments.)

23 The Corps did solicit comments from the United States Department of Agriculture's Soil Conservation Service and, as a result, the EIS had a detailed account of the project's effect on agriculture in Lewis County, West Virginia. The EIS states:

The West Fork River Basin contains one of the most important agricultural areas in northern West Virginia. The principal products are livestock, hay, grass, poultry and dairy products. The most desirable farm and grazing lands are in the valleys, particularly those of the West Fork River and Skin Creek. The reach of Skin Creek in the project area is reported to be the second most important dairying area in Lewis County. Several of the farms to be acquired for the project purposes contain over 150 acres. In all there are 132 farms, but many are worked only part-time. (EIS p. 3.)

* * *

The Soil Conservation Service points out that the proposed lake and developments would significantly reduce the agricultural productive capacity of the county. The project will remove about 10 percent of



the total cropland and 16 per cent of bottom land and terrace spils in the county from active agricultural use. (EIS, p. 6.)

* * *

The loss of the cropland and pasture will reduce the agricultural production of Lewis County appreciably. (EIS, p. 7.)

The Court fails to see how the EIS could be more candid about the projcet's effect on agriculture.

[24] The Corps defines the "Weston damage district" as "that area lying downstream of the [proposed] dam site located above Weston and extending to the upstream limits of Clarksburg." (1966 Report, p. 31.)

[25] Plaintiff's complaints about

the park aspects of the project are presented twice in its brief. See heading "B.", supra, dealing with short-term/long-term use.

[26] The first alleged deficiency which Plaintiff borrows from the Gillham Dam case is:

> The E.I.S. fails to give the effects of flow fluctuation and stability. (Plf.'s Interroga. Ans. 14 (b) (3).

In this case, the data developed by the Corps shows that the dam will reduce the extent of flow fluctuation, downstream, thereby improving biology. For example, downstream fishing will be improved. According to the Department of the Interior's Fish and



Wildlife Service,

> Downstream from the dam steams [sic] flows will be improved due to reduced fluctuations and turbidities, but this alone will not provide a downstream fishery because released water would be too cold. [However,] [w]ith the incorporation of multiple-level outlets as planned, the downstream releases will produce a significant increase in the stream fishery. (1966 Report, p. 188.)

Plaintiff offers nothing to counter the assertion that the downstream environment will be stabilized by the project.

The second and third alleged deficiencies (which are closely related) also borrowes from the Gillham Dam case are:

> The E.I.S. fails to give the effects of the intrusion of other fish species. (Plf.'s Interrog. Ans 14 (b) (4).)
>
> * * *
>
> The E.I.S. fails to give the effects of impoundment on existing food chains and downstream alluvial deposits. (Plf.'s Interrog. Ans. 14(b) (5).)

To the extent that the subjects in these assertions have any relevance to this project, they are dealt with in the EIS. The EIS states (p. 7):

> The ecological systems funcitioning within the stream and along its banks will be exchanged for systems associated with a slack water environment.

In addition, the EIS lists the fish species presently in the streams



(page 2) and the species which are expected to populate the lake when the project is finished (page 6). Unlike the Gillham Dam case, Plaintiff here has not advanced any facts which raise a question about rich, alluvial deposits downstream, and raising this contention in this case is nothing more than an irrelevant distraction.

The fourth complaint which Plaintiff lifts from the Gillham Dam case is this:

> The E.I.S. fails to thoroughly give the effects of reservoir drawdowns on shoreline vegetation. (Plf.'s Interrog. Ans. 14 (b) (6).)

The Court would balance Plaintiff's total failure to advance facts to

support this allegation against the full discussion in the EIS, which follows:

> Releases from the lake for water quality control and water supply purposes will usually result in a falling water level during the summer months. The startting date and rate of fall of the water surfaces will depend to a large extent on the precipitation and runoff condition at the time. The receding water level will expose areas of bare soil around the periphery of the lake. The widths of these areas will depend on the slope of the bank as well as the vertical drop in the water level. Except for the upper end of the main arm of the lake and the upper ends of the larger tributaries, the banks exposed by lake drawdown are generally steep and the exposure will not be extensive due to the facts that



> the expected drawdown is only 7.2 feet from May through October of an average rainfall year. Fortunately, where the upstream bottomlands will be exposed, they are narrow, so the exposure will not be excessive. Areas subject to annual inundation and exposure are unlikely to develop a mature terrestrial flora or a mature aquatic flora. Early invader species should characterize the flora whether the areas are exposed or inundated. The animal species that can be expected to frequent these areas include those terrestrial, acquatic and amphibious species able to find food and cover to their liking. There will be fewer terrestrial than aquatic and amphibious species. A copy of the summer season drawdown schedule is attached [to the EIS]. (EIS, pp. 7-8)

From the foregoing, the Court concludes that the drawdown problem and its relationship to shoreline vegetation re-

ceived more than adequate treatment in the EIS.

[27] Plaintiff did not press the Constitutional claims in its summary judgment papers.



CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above entitled cause by enclosing the same in an envelope addressed to each such attorney and Solicitor General of the United States at his or her respective address as disclosed by the pleadings and Supreme Court Rules of record herein, with postage fully paid, and by depositing said envelope in a United States Post Office depository in Grafton, West Virginia, on the 29th day of August, 1977.

LaVerne Sweeney

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Supreme Court, U. S.
FILED
NOV 25 1977
MICHAEL RODAK, JR., CLERK

No. 77-321

# In the Supreme Court of the United States

OCTOBER TERM, 1977

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UPPER WEST FORK RIVER WATERSHED ASSOCIATION, by KENNETH PARKER, PRESIDENT, LEWIS COUNTY, WEST VIRGINIA, PETITIONER

*v.*

CORPS OF ENGINEERS, UNITED STATES ARMY, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

---

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## OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 2-4) is unreported. The opinion of the district court (Pet. App. 5-128) is reported at 414 F. Supp. 908.

## JURISDICTION

The judgment of the court of appeals was entered on May 9, 1977. A petition for rehearing was denied on June 1, 1977. The petition for a writ of certiorari was filed on August 29, 1977. Petitioner asserts that the jurisdiction of this Court is conferred by 28 U.S.C. 2101(c); the correct provision is 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the Corps of Engineers' environmental impact statement on the Stonewall Jackson Lake Project complied with the National Environmental Policy Act of 1969.

## STATEMENT

The history of the Stonewall Jackson Lake Project is set forth in the district court's opinion (Pet. App. 28-37). In October 1971, the Corps of Engineers filed a final environmental impact statement (EIS) on the project with the Council on Environmental Quality, as required by Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 853, 42 U.S.C. 4332(2)(C). The project, a multi-purpose reservoir on the West Fork River at Brownsville, West Virginia, was designed to provide flood and water-quality control, to increase water supply, and to enhance recreational opportunities. The EIS described the project design, discussed environmental impacts, including unavoidable adverse effects, and considered five alternatives to the proposed action.

Petitioner (Watershed Association), a West Virginia Corporation comprised largely of landowners in the project area, opposed the single-reservoir plan. Instead, petitioner sought the development of a "watershed system"—a series of small dams on the Upper West Fork River and its tributaries. Petitioner brought suit to enjoin construction of the reservoir on the ground, *inter alia,* that the EIS was inadequate because it did not list the watershed system as an alternative.

By agreement of the parties (Pet. App. 11, 106-107), the case was submitted to the district court on cross-motions for summary judgment. Petitioner attached to its supporting depositions a General Design Memorandum



(GDM), prepared by the Corps in January 1971, detailing the costs and benefits of the Stonewall Jackson Reservoir and setting forth the project design (Pet. App. 10-11). The GDM, as well as the EIS, referred to a report completed by the Corps in 1966 and published as a congressional document, S. Doc. No. 109, 89th Cong., 2d Sess. (1966) (Pet. App. 15; App. 12).[1] That report, which was introduced into the record by direction of the district court (Pet. App. 16), extensively reviewed the West Fork Basin Project, considered the feasibility of a small-dam system, and concluded that a series of small dams could not achieve the range of flood control and recreational purposes that would be achieved by the proposed single reservoir (Pet. App. 45-57). The court also had before it a 1975 Review of Environmental Features on the Stonewall Jackson Project, which was prepared by the Corps to update the project plans in the EIS (Pet. App. 16-18).

On the basis of these and other materials, which constituted effectively the administrative record considered by the Secretary of the Army in selecting the multi-purpose reservoir plan, the district court granted summary judgment in favor of the Corps of Engineers. The district court first stated that the posture of the case was proper for summary disposition, since the affidavits filed by the petitioner presented only general and conclusory assertions rather than material facts contradicting representations by the Corps (Pet. App. 18-25). The district court then concluded that the EIS fully comported with the requirements of the NEPA (Pet. App. 92). Specifically, the district court determined that, while a watershed system was a theoretical alternative to the multi-purpose reservoir, it was appropriately omitted

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[1] "App." refers to the appendix in the court of appeals.

from the EIS because a previous analysis by the Corps had established that it was not a reasonable or realistic alternative (Pet. App. 56-57).

The court of appeals affirmed "for reasons stated in the Memorandum Order of the District Judge" (Pet. App. 4).

**ARGUMENT**

The decision of the court of appeals is correct, does not conflict with decisions of this Court or of any other court of appeals, and presents no issue warranting further review.

1. Although the NEPA requires that alternatives to proposed action be stated in the EIS, 42 U.S.C. 4332(2)(C)(iii), the courts of appeals have recognized that this requirement must be interpreted by a "rule of reason." Thus, it is sufficient that an EIS encompass all "reasonable alternatives." See, *e.g., Robinson* v. *Knebel,* 550 F. 2d 422, 425-426 (C.A. 8); *Swain* v. *Brinegar,* 517 F. 2d 766, 780 (C.A. 7); *Fayetteville Area Chamber of Commerce* v. *Volpe,* 515 F. 2d 1021, 1027-1028 (C.A. 4), certiorari denied *sub nom. Interstate 95 Committee* v. *Coleman,* 423 U.S. 912; *Sierra Club* v. *Morton,* 510 F. 2d 813, 819 (C.A. 5); *Sierra Club* v. *Stamm,* 507 F. 2d 788, 793 (C.A. 10); *Life of the Land* v. *Brinegar,* 485 F. 2d 460, 472 (C.A. 9), certiorari denied, 416 U.S. 961; *Natural Resources Defense Council, Inc.* v. *Morton,* 458 F. 2d 827, 834 (C.A. D.C.). Here the district court found, and the court of appeals agreed, that the environmental impact statement on this project adequately set forth alternatives to the proposed action. Although petitioner contends (Pet. 41-49) that discussion of a watershed system was essential, the district court found that petitioner "ha[d] not advance[d] anything substantial and dependable to indicate that the watershed idea is a reasonable or realistic alternative for meeting the Congressional objectives outlined above" (Pet. App. 56). There is no need for this Court to review that essentially factual determination.



2. Despite petitioner's contention (Pet. 27-32), disposition by summary judgment was proper. Although petitioner apparently did contest the propriety of a summary judgment for respondents, the district court found (Pet. App. 55) that petitioner had relied on mere assumptions and inferences, rather than substantial facts, in arguing that a watershed system was a feasible and comprehensive alternative to the project. In view of the contrary evidence contained in the pleadings, depositions, and affidavits, with attachments, those unsubstantiated assertions did not create a concrete and material factual dispute. See Rule 56(e), Fed. R. Civ. P. The issues in this case thus remained "clear-cut and simple," and appropriate for summary judgment. *Kennedy* v. *Silas Mason Co.,* 334 U.S. 249, 257.

3. Petitioner contends (Pet. 31-41) that the district court improperly considered the 1966 Report and the Corps' 1975 Review. However, the 1966 Report was introduced into the record by the district court after petitioner itself brought the report to the court's attention. Both the EIS, incorporated as part of the pleadings, and the General Design Memorandum, filed by petitioner (Pet. App. 10-11), referred to the 1966 Report (Pet. App. 15; App. 12). Moreover, as a congressional document, the 1966 study was a matter of public record accessible to petitioner. Thus, consideration of the report was proper and did not prejudice petitioner.

Nor was consideration of the 1975 Review impermissible. The district court characterized the 1975 Review as "unessential" to its decision (Pet. App. 18). The original EIS, though an early specimen of an agency EIS, sufficiently complied with the NEPA without the augmentation provided by the 1975 Review. That Review was not a critical amendment needed to complete the EIS and hence

was not a "supplemental EIS," which remedies deficiencies in the original EIS or analyzes additional proposals and which requires public review and circulation among appropriate agencies. 40 C.F.R. 1500.11(b). Consideration of the Review—to which petitioner had an opportunity to respond (Pet. App. 17-18)—was not improper and did not prejudice petitioner.

Review of these documents by the district court did not make summary disposition improper. As the district court observed, petitioner "had sufficient time to discover and develop evidentiary data" and simply failed to "show sufficient factual particulars to establish that there are genuine issues for trial" (Pet. App. 24).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1977.

DOJ-1977-11